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82-420

No. ....

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1982

JAMES HENRY PATTERSON,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Appeal from the United States Court of Appeals for the Ninth Circuit

Petition for Certiorari--Criminal Case

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Question Presented

Did the trial court commit reversible error in admitting the Grand Jury testimony of James McKay without a showing that at the time he testified the subject matter was fresh in his mind or accurately reflected the witness' knowledge?

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JAMES HENRY PATTERSON,
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v.

UNITED STATES OF AMERICA,
Respondent.

Petition for Certiorari--Criminal Case

Petitioner, James Henry Patterson, respectfully prays that a writ of certiorari be issued to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit, entered on June 2, 1982, as modified upon denial of a petition for rehearing on July 16, 1982, affirming the conviction of James Henry Patterson

for two counts of receiving stolen property in violation of Title 18 U.S.C. 2313.

Opinion Below

The opinion of the United States Court of Appeals for the Ninth Circuit, dated June 2, 1982, affirming in part the judgment of guilt in United States of America, Plaintiff-Appellee v. James Henry Patterson, Defendant-Appellant, No. 81-1211, appears as Appendix A of this petition and is reported at 678 F.2d 774. The order of July 16, 1982, denying the petition for rehearing and modifying the opinion appears as Appendix B of this petition.

Jurisdiction

This Honorable Court has jurisdiction to review the judgment in

question by writ of certiorari as is provided by 28 U.S.C. 1254(1).

Federal Statutory Provision Involved

The case involves interpretation of Federal Rules of Evidence, Rule 803(5), which provides:

> (5) Recorded recollection. A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable him to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in his memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.

Statement of the Case

On May 5, 1980, an indictment was filed in the United States District for the District of Nevada charging

petitioner and two co-defendants with receiving stolen property in violation of 18 U.S.C. 2313, and conspiracy to transport stolen property in violation of 18 U.S.C. 2312.

On May 13, 1980, petitioner was arraigned and pleaded not guilty. Trial by jury commenced on July 22, 1980, before The Honorable Edward C. Reed, Judge. On July 29, 1980, petitioner was found guilty of two counts of violation of 18 U.S.C. 2313 and of one count of conspiracy in violation of 18 U.S.C. 2312. His two co-defendants, Heidinger and Austin, were acquitted on all counts. On September 5, 1980, the court sentenced petitioner to four years on each count, to run concurrently with each other. Petitioner was admitted to bail pending

appeal on September 4, 1980. On February 23, 1981, petitioner's motion for new trial was denied.

Petitioner's notice of appeal was filed on February 23, 1981. On June 2, 1982, the U.S. Court of Appeals for the Ninth Circuit affirmed petitioner's conviction for violating 18 U.S.C 2313 and reversed the conviction for violating 18 U.S.C. 2312. (United States v. Patterson, 678 F.2d 774 (9th Cir. 1982)). On July 16, 1982, the Court of Appeals denied a petition for rehearing and made certain modifications in its opinion.

Facts Relating to the Offense

Petitioner is a building contractor in the Reno, Nevada,area, who at the time of the events in questions was engaged in building a large tract of

low-cost homes in Desert Springs. He employed several subcontractors and a large amount of construction equipment.

In 1979 and 1980, an investigation by local and Federal authorities determined that several forklifts, including the two involved in the indictment, had been stolen in California. Petitioner advised the authorities, and later testified at trial, that he had bought them and obtained bills of sale for them. He had replaced the ignition and cut the gas cap lock on one of the forklifts because the keys were missing, and he had cut off the side panels from one to prevent overheating. Petitioner denied any knowledge that the forklifts had been stolen.

At trial, one James McKay,

petitioner's nephew, was called by the Government and testified that, while working for petitioner in 1979, he had helped him cut the locks and side panels off certain forklifts. He testified that he did not remember petitioner telling him where he got the forklifts. After examination of his Grand Jury testimony failed to refresh McKay's recollection, the court, over objection, admitted a portion of McKay's Grand Jury testimony in which he had said that petitioner had told McKay that the forklifts were "hot".

Reasons for Granting the Writ

The United States Court of Appeals for the Ninth Circuit has rendered a decision in this action which appears to be in conflict with decisions of

a United States Court of Appeals decision for the Seventh Circuit. Further, this court's decision herein has departed from the accepted and usual course of judicial proceedings in that admission of certain crucial testimony was erroneous.

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Argument

THE ADMISSION OF THE GRAND JURY TESTIMONY OF JAMES McKAY IN EVIDENCE AT TRIAL WAS REVERSIBLE ERROR

James McKay, a key witness for the government, testified that he was a relative and employee of defendant James Patterson at the Desert Springs job site where he worked for defendant until the end of the summer of 1979. (RT 61-64).[1/] He testified to an incident during his employment in which he, in the company of defendant, cut some locks and removed side panels from two forklifts. (RT 66-73). In response to a question from the prosecutor as to whether defendant told

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1/ RT refers to Reporter's Transcript of trial testimony appended hereto verbatim as Appendix C.

told McKay where he obtained the forklifts, McKay testified that he did not recall defendant telling him. (RT 73-74.) McKay was then shown a transcript of his testimony before the Grand Jury on March 10, 1980, and asked whether that transcript refreshed his memory. (RT 74.) He replied:

> McKAY: I get a recollection in my memory saying that I must have said that. But as I sit here right now, I cannot say that I remember Mr. Patterson or Jim saying this to me at that time. It's been a long time, you know. This is almost two years ago, and I've got to swear under oath right now, and I can't say that I can actually remember him saying that. If I can say that I can go off with that and say --

The following testimony then occurred:

Q: . . . As you sit here today, you can't remember what Mr. Patterson said to you about where he got the forklifts?

A: Right.

Q: But at the time you appeared before the Grand Jury back in March and testified to what he said, at that time apparently you were able to recall; is that correct?

A: Yeah, I was a lot madder at him then.

Q: Well, were you able to recall a little bit better?

A: I must have been.

Q: You say you were mad at him then. Were you lying before the Grand Jury?

A: No, I don't think so.

Counsel for the government then offered the portion of the Grand Jury testimony into evidence. (RT 76.) Upon objection by counsel for defendant, the court asked the witness, "But is

the Grand Jury transcript which you read, is it accurate?" The witness replied, "I believe so." The court then admitted into evidence as past recollection recorded a portion of the Grand Jury transcript in which McKay had testified that the defendant had said that he had gotten the forklifts out of California from a guy he knew down there and that they were "hot". (RT 76-77.)

This evidence of defendant's alleged admission was not properly admitted as recorded recollection under Rule 803(5) of the Federal Rules of Evidence because it was not "shown to have been made . . . when the matter was fresh in [the witness'] memory . . . ." (Rule 803(5), supra.)

The witness, McKay, never testified

that the conversation with Patterson was fresh in his mind when McKay testified before the Grand Jury in March of 1980. Indeed, even on the very different question of whether he was better able to recall the testimony in March of 1980 than at the time of trial, McKay's responses were highly equivocal. He testified that he, McKay, was "a lot madder at" defendant then; that he "must have been" able to recall "a little better" then; and that he did not think he was lying before the Grand Jury. Later in MacKay's trial testimony, McKay explained that he testified before the Grand Jury in the manner that he did because he had heard that Patterson was saying a lot of "bad things" about him and because he had been fired. McKay said that he had exaggerated and

"stretched" his testimony before the Grand Jury by saying things were true when he actually could not remember them to be true. (RT 169, 170, 186, 187.) This testimony falls far short of establishing the foundation requirement of Rule 803(5) that the matter was fresh in the witness' mind at the time of his statement in March of 1980.

Aside from the lack of proper foundation, it affirmatively appears from the record that the alleged admission of defendant could not have been fresh in McKay's mind at the time of his Grand Jury testimony, since that admission occurred sometime in April of 1979, and the Grand Jury testimony occurred in March of 1980. The Grand Jury testimony, thus, was

not made at or near the time of the event or contemporaneously with it, but at least ten months afterwards at a time when the witness, being mad at Patterson, was motivated to fabricate evidence adverse to James Patterson.

The United States Court of Appeals relied on United States v. Senak, 527 F.2d 129 (7th Cir., 1975), cert. denied, 425 U.S. 907, to justify admission of McKay's prior testimony. Petitioner submits that this reliance was misplaced. Although the statement in Senak was made three years after the events it described, the Senak court found "particularly significant" the fact that the witness had gone over the written statement and had made and initialled several deletions and amendments relating to details, which

established that the matters were fresh in her mind when she gave the statement. (Ibid., at 142.) The actual holding of Senak was that under the "unusual circumstances" of that case, including the fact that the statement was not inconsistent with the witness' trial testimony, the introduction of the statement was not reversible error. (Ibid., 139, 142, emphasis added.)

In contrast, the present case does not show any of the factors that motivated the Senak court to declare any error nonprejudicial. McKay's testimony may have shown that his memory was better when testifying to the Grand Jury, but the issue was whether the event was fresh in his mind at before the Grand Jury. This was not established by simply showing that his memory was even worse four and

one-half months later when the trial of the action occurred. Considering all of the pertinent facts and circumstances, it was established that the alleged conversation was at least ten months old when McKay testified before the Grand Jury. The Grand Jury testimony was much closer in time to the trial, when it was established that McKay had no memory of the conversation itself, and McKay never testified that the matter was fresh in his mind and that he could remember details of the conversation at the time of his Grand Jury testimony. The most McKay said was that "apparently" he could recall the conversation before the Grand Jury and that he "must have been" able to recall "a little bit better" than he could at trial. It was also

established that McKay was "a lot madder" at Patterson at the time he testified before the Grand Jury. (RT 74, 75.)

Senak thus does not support the admissibility of this evidence, either leegally or factually. The case for admissibility is much weaker than in Senak, and McKay's Grand Jury testimony should have been excluded.

In addition, the proferred evidence failed to satisfy the other foundational requirement of Rule 803(5), that the statement reflect the witness' prior knowledge correctly. The only evidence which addresses this foundational point is McKay's affirmative answer to the judge's question of whether the Grand Jury transcript which the witness had just

read was accurate. Although the witness said he believed it was accurate, this establishes only the witness' opinion that the transcript is an accurate record of what he said to the Grand Jury. McKay never testified that the Grand Jury testimony was true or accurately reflected Patterson's alleged statement on the job site. Again, any inference that the prior testimony was accurate is undercut by the ten-month lapse between the alleged event and the Grand Jury testimony, and even more so by the witness' admitted bias at the time of his Grand Jury testimony.

In addressing this point, the Court of Appeals rejected as frivolous the argument that McKay said only that the Grand Jury transcript was accurate,

not that his testimony was accurate. (Opinion, page 13, lines 13-20.) This, however, is literally what McKay said. Furthermore, under the circumstances of this case, McKay's trial testimony cannot reasonably be interpreted as confirming the accuracy of his account to the Grand Jury of Patterson's conversation with him. McKay said at trial that he believed the Grand Jury transcript was accurate, but immediately before that testimony he had testified that he could not remember the conversation with Patterson at the time of trial. If he did not remember the conversation with Patterson at trail, then he could hardly be testifying that the Grand Jury transcript accurately reflected the conversation with Patterson. The only possible logical meaning of his trial testimony

is that he did not now remember the conversation, although he believed the transcript accurately reflected what he said to the Grand Jury.

United States v. Edwards, 539 F.2d 689 (9th Cir., 1976), cert. denied, 429 U.S. 984, does not support the government's position. In Edwards, the prior statement of a witness was held properly admitted under Rule 803(5). The statement in Edwards was made the day after the events in question, and contained the witness' handwritten declaration that "I have read this statement of two pages, and it is true and correct to the best of my knowledge." (Edwards, at 694.) Furthermore, in Edwards the witness testified at trial that he believed the statement accurately reflected his recollection

at the time it was made. In this case, McKay's Grand Jury testimony was made ten months after the event, at a time when, being mad at Patterson, he had a motive to fabricate evidence against him. McKay admitted that he had exaggerated and stretched his testimony before the Grand Jury by saying things were true when he actually could not remember them to be true. Unlike Edwards, there was no testimony in this case that McKay's Grand Jury testimony accurately reflected the conversation with Patterson.

Since the Grand Jury testimony was not shown to have been made at a time when the matter was fresh in McKay's memory, nor shown to reflect McKay's knowledge correctly, it was

error to admit it as recorded recollection under Rule 803(5).

Nor was the evidence admissible under Rule 801(d)(1)(A) as a prior statement by a witness, since the prior statement was not "inconsistent with his testimony" at trial. Absent obvious evasion or equivocation which does not appear in the record in the instant case, the testimony of a witness that he does not remember an event is not "inconsistent" with a prior statement by him describing that event. Westinghouse Electric Corp. v. Wray Equipment Corp., 286 F.2d 491, 493 (1st Cir., 1961); People v. Green (1971) 3 Cal.3d 981, 988, 92 Cal.Rptr 494, 479 P.2d 998. McKay's inability to recall any such admission by defendant during the trial in July was not inconsistent with his testimony in

March within the meaning of the case law, and the evidence was thus not admissible under Rule 801(d)(1)(A). Its admission constituted error.

The error was not, as the United States Court of Appeals held, harmless. The court based this conclusion on the fact that F.B.I. agent Olsen had testified, without objection, that McKay had told him of the same conversation with Patterson on or about February 12, 1980. However, it is obvious that any objection at that point to Olsen's testimony would have been futile, in view of the court's previous ruling and the fact that the court had already erroneously admitted McKay's Grand Jury testimony. Moreover, the testimony from Olsen was far different in character from that of

McKay. Olsen may have been discredited for his memory of a hearsay-on-hearsay conversation and the fact that he was a law enforcement officer interested in obtaining a conviction against Patterson.

For these reasons, and because the issue of knowledge was the central and only issue at trial, the admission of McKay's Grand Jury testimony cannot in any way be construed as harmless error in this case.

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CONCLUSION

For the foregoing reasons, petitioner respectfully submits that the writ of certiorari be issued to review the decision of the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

DOUGLAS R. SCHMIDT

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Attorneys for Petitioner
JAMES HENRY PATTERSON

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	)	No. 81-1211
	)	D.C. No.
Plaintiff/Appellee,	)	CR-R-80-22, ECR
	)	
vs.	)	OPINION
	)	
JAMES HENRY PATTERSON,	)	
	)	
Defendant/Appellant.	)	
	)	

Appeal from the United States District Court for the District of Nevada
Edward C. Reed Jr.,
District Judge, Presiding
Argued and Submitted, November 10, 1981

Before: KENNEDY and SKOPIL, Circuit Judges, and BURNS,* District Judge

BURNS, District Judge

Defendant James Patterson appeals his conviction on two counts of

*The Honorable James M. Burns, Chief United States District Judge for the District of Oregon, sitting by designation.

receiving stolen property, 18 U.S.C. § 2313, and on one count of conspiracy to transport stolen motor vehicles in interstate commerce, 18 U.S.C. §§ 371 and 2312. He assigns several errors: 1) the grand jury testimony of a witness was erroneously admitted into evidence; 2) the evidence was insufficient to prove his knowledge; 3) the conspiracy conviction should be reversed because his alleged coconspirators were acquitted; 4) the jury was improperly instructed, and 5) the closing argument of co-defendant's counsel was improperly limited.

We affirm the convictions for receiving stolen property and reverse the conspiracy conviction.

Three forklifts were stolen from different companies in California and eventually were recovered in the

Reno-Sparks area of Nevada. The first was a large, yellow, 1978 Liftall HT 100, No. 78664. The defendant purchased this forklift October 30, 1978, from two men he met at a casino in Sparks. The second forklift was a small, yellow 1977 Liftall LT 60, No. 77511. It was purchased from two men outside the defendant's house in late April 1979 by Manuel Crummett, a contractor working for the defendant. The defendant later lent this forklift to Western Nevada Supply, which still later sent it to Reno Forklift for repairs. The third forklift was a small, green, 1978 Liftall LT 60, No. 78595, which appeared at the defendant's house at the same time as the second forklift. Defendant bought this forklift from two men who returned the day after they delivered the forklifts to defendant's house. The

two men who sold defendant the third forklift were the same men who sold him the first one. The government alleged the sellers were Patterson's codefendants, Gerald Heidinger and Steve Austin. The grand jury indicted Heidinger and Austin for transporting the second and third forklifts in interstate commerce and selling them and for conspiring with Patterson and unknown other persons to transport stolen motor vehicles in interstate commerce. As part of the conspiracy count Heidinger and Austin were accused of delivering the first forklift to Patterson, and Patterson was accused of receiving the second and third forklifts from Heidinger and Austin. Heidinger and Austin were acquitted by the same jury which convicted defendant.

The defendant and James McKay, defendant's nephew and then an employee of his, replaced the ignition system on one of the two forklifts delivered to the defendant's property in late April 1979. In addition, they cut off padlocks from the gas tanks and elsewhere on both forklifts and removed side panels from one of them. The grand jury indicted the defendant May 5, 1980, charging him with receiving stolen property and with conspiring to transport stolen motor vehicles. The defendant was convicted after a jury trial in July 1980 and was sentenced to three, four-year jail terms, each to run concurrently. The trial judge denied defendant's motion for a new trial March 23, 1981, and judgment was entered.

ISSUES

I. Grand Jury Testimony

Testifying under a grant of immunity, James McKay (defendant's nephew) told the grand jury on March 10, 1980, the defendant had told him the forklifts were obtained from a man in California and they had been stolen. At trial McKay testified he could not remember the defendant telling him about the source or legality of the forklifts.[1] After the prosecutor tried without success to refresh McKay's memory with a transcript of his grand jury testimony, the trial judge allowed the pertinent portion of the grand jury testimony to be read into the record as a past recorded recollection exception to the hearsay rule.[2]

A document is admissible as past recorded recollection if 1) the witness once had knowledge about the matters in the document, 2) the witness now has insufficient recollection to testify fully and accurately, and 3) the record was made at a time when the matter was fresh in the witness' memory and reflected the witness' knowledge correctly.[3/] United States v. Edwards, 539 F.2d 689, 691-692 (9th Cir.), cert. denied, 429 U.S. 984 (1976). Accord, Clark v. City of Los Angeles, 650 F.2d 1033, 1037-1038 (9th Cir. 1981) (stating the rule but not reaching the issue of admissibility).

Defendant claims the third foundation requirement of Fed. R. Evid. 803(5) was not met and thus admission of the grand jury transcript was error.

The defendant specifically contends the government failed to show 1) the matter was fresh in McKay's mind when he testified before the grand jury, and 2) McKay's statements to the grand jury were an accurate reflection of his knowledge at that time. We disagree

We start with the proposition that a district judge's ruling to admit evidence will not be overturned absent abuse of discretion. See, e.g., United States v. Cox, 633 F.2d 871, 874 (9th Cir. 1980), cert. denied, 102 S.Ct. 159 (1981); United States v. Ford, 632 F.2d 1354, 1377 (9th Cir. 1980), cert. denied, 450 U.S. 934 (1981); United States v. Kearney, 560 F.2d 1358, 1369 (9th Cir.), cert. denied, 434 U.S. 971 (1977). The trial judge has broad discretion in

determining whether evidence is supported by proper foundation. United States v. Ford, 632 F.2d at 1377. Assuming foundational requirements are met, admission into evidence of portions of grand jury testimony as past recorded recollection is proper use of such testimony. See United States v. Barrow, 363 F.2d 62, 67 (3rd Cir. 1966), cert. denied, 385 U.S. 1001 (1967). To decide whether McKay's grand jury testimony was erroneously admitted, we must determine whether the trial court abused its discretion in finding that the matter was fresh in McKay's mind when he testified before the grand jury and that his statements to the grand jury accurately reflected his knowledge at that time.

A traditional rule, commonly applied before adoption of Rule 803(5), was that freshness is defined by contemporaneousness, i.e., the witness' recollection must have been recorded at or near the time of the event. 3 J. Wigmore, Wigmore on Evidence, § 745 (Chadbourne rev. 1970). In this case McKay's grand jury testimony occurred at least ten months after the conversation in which the defendant told him the forklifts were stolen. Even before the adoption of Rule 803(5), though, some courts used a more flexible rule giving the trial judge discretion to determine freshness on a "case-by-case basis giving consideration to all pertinent aspects including the lapse of time which reasonably and properly bear upon the

likelihood of the statement being an accurate recordation of the event to which the memory related." United States v. Senak, 527 F.2d 129, 141 (7th Cir. 1975), cert. denied, 425 U.S. 907 (1976) (pre-Rules case).[4/] Broad discretion for the trial judge is clearly intended under Fed. R. Evid. 803(5), as the advisory committee notes indicate: "No attempt is made in the exception to spell out the method of establishing the initial knowledge or the contemporaneity and accuracy of the record, leaving them to be dealt with as the circumstances of the particular case might indicate." 28 U.S.C. app. p. 581 (1976). See United States v. Williams, 571 F.2d 344, 348-50 (6th Cir.), cert. denied, 439 U.S. 841 (1978) (finding no abuse of discretion in admitting under

Rule 803(5) statement of witness to agent relating conversation that took place six months earlier).

We cannot say the trial judge abused his discretion in finding that McKay's memory was fresh at the time he testified before the grand jury, although the question admittedly is a close one. At least ten months elapsed between McKay's conversation with the defendant and his grand jury testimony. McKay admitted he was angry with the defendant when he appeared before the grand jury. In attempting to lay the foundation, the prosecutor and trial judge asked ambiguous questions, and McKay equivocated wherever possible. Still, the trial judge elicited responses showing that at trial McKay could not remember his conversation with the

defendant and that before the grand jury he had remembered the crucial conversation. Thus, it was well within the discretion of the trial judge to determine, under all of the circumstances, that the conversation had been fresh in McKay's mind when he appeared before the grand jury.

The past recorded recollection exception also requires a showing that the record accurately reflected the witness' knowledge at the time the record was made. The defendant characterizes the trial court's inquiry of McKay on that subject as asking McKay whether the grand jury transcript was accurate rather than whether his grand jury testimony was accurate. We reject the defendant's characterization as frivolous. We deem the trial court's

question to have required from McKay a response regarding the accuracy of his statements to the grand jury (as embodied in the transcript). McKay told the trial court he did not think he had lied to the grand jury. He also said he had recalled the events in question better when he testified before the grand jury. Moreover, the indications of reliability are stronger in this case than in United States v. Edwards, 539 F.2d at 691-692.[5/] Therefore, we find no abuse of discretion in the trial court's determination that McKay's grand jury testimony was an accurate reflection of his knowledge at that time.

In summary, the grand jury testimony was admissible as past recorded recollection. In the trial

judge's determination that the foundation requirements had been met, we find no abuse of discretion. Further, even if the trial court had abused its discretion, the defendant suffered no prejudice thereby because the crucial part of McKay's grand jury testimony, i.e., defendant had told hom the forklifts had been stolen, came into evidence without objection by other means.[6/]

Defendant also claims the damning testimony was inadmissible as a prior inconsistent statement under Fed. R. Evid. 801(d)(1)(A). We need not reach that issue because of holding that McKay's grand jury statements were admissible as past recorded recollection.

II. Sufficiency of the Evidence

Defendant contends the

evidence, even including McKay's grand jury testimony, is insufficient to prove the element of knowledge, namely, that the defendant knew the forklifts were stolen. Defendant admitted receiving the forklifts. McKay's grand jury testimony provided proof that the defendant knew the forklifts had been stolen. McKay made the same statement to law enforcement officers on previous occasions.[7/] Despite McKay's evasiveness, his selective memory, his contradictory testimony and his relationship with the defendant, the jury was entitled to believe him. United States v. Anderson, 642 F.2d 281, 285 (9th Cir. 1981). Further, the test for sufficiency of the evidence is whether "after viewing the evidence in the light most

favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Jackson v. Virginia, 443, U.S. 307, 319 (1979) (emphasis in original). The findings of the trier of fact will not be set aside unless clearly erroneous. Anderson, 642 F.2d at 285. There was sufficient evidence for the jury to conclude beyond a reasonable doubt that the defendant received the forklifts and that he knew they had been stolen. Therefore, we uphold the jury's verdict on the convictions of receiving stolen property.

III. Conspiracy Count Conviction

Defendant urges reversal of his conspiracy conviction; his co-conspirators who were named in the indictment were acquitted and, he claims,

no evidence was presented to show he conspired with unnamed persons.

The general rule is that inconsistent verdicts may stand, even when a conviction is rationally incompatible with an acquittal. United States v. Brandon, 633 F.2d 773, 779 (9th Cir. 1980); United States v. Dunn, 564 F.2d 348, 360 & n.24 (9th Cir. 1977). An exception to that rule is that acquittal of all but one of the alleged conspirators requires acquittal of the remaining defendant. Lubin v. United States, 313 F.2d 419, 423 (9th Cir. 1963). However, if an indictment refers to unknown persons as coconspirators and the government supplies evidence to support a charge that the defendant conspired with the unknown persons, a conspiracy conviction will

stand even if all other named defendants are acquitted. Id.

The other two defendants charged with conspiracy, Heidinger and Austin, were acquitted. Although the indictment refers to other unknown persons, the government's only evidence to support the involvement of unknown persons with defendant in a conspiracy was that defendant had told McKay that he had a friend working at a truck line or forklift business who would steal the forklifts and bring them to him. This, even together with the proof that defendant knowingly received stolen property, was not sufficient to support a reasonable inference that defendant had engaged in a conspiracy to transport stolen motor vehicles in interstate commerce with an

unknown person. United States v. Gardner, 475 F.2d 1273, 1278 (9th Cir. 1973), cert. denied, 414 U.S. 835; see United States v. Espinosa-Cerpa, 630 F.2d 328, 330 n.2 (5th Cir. 1980); cf. United States v. Allen, 613 F.2d 1248, 1253 & n.6 (3rd Cir. 1980) (evidence sufficient to show defendant conspired with some other person); Didenti v. United States, 44 F.2d 537, 538 (9th Cir. 1930) (evidence sufficient to show defendant conspired with persons unnamed in indictment). Therefore, Patterson's conspiracy conviction cannot stand.

IV. Jury Instructions

Defendant objects to jury instructions 19 and 23 on grounds they are contradictory on the issue of intent. Defendant's counsel did not object to

either instruction when the trial judge reviewed each proposed jury instruction with both counsel. Defendant's counsel also did not request additional instructions on the issue of intent. In the absence of a showing that substantial rights of the defendant were affected, the appellate court is not required to consider objections to the instructions for the first time on appeal. United States v. Alvarez, 469 F.2d 1065, 1067 (9th Cir. 1972). There is no showing here that substantial rights of the defendant were affected. Therefore, we decline to consider the defendant's objections to jury instructions for the first time on appeal. If we were to consider the objections made, however, we would find them without merit. Considered in their

entirety, the instructions adequately explain the issue of intent.

V. Closing Argument

Finally, defendant contends that the trial judge abused his discretion by limiting to 50 minutes the closing argument of defendant's counsel. The trial judge notified counsel a few days in advance that he intended to limit the length of closing arguments. He extended the time allotted to defendant's counsel by five minutes when requested. During argument the trial judge gave counsel a two-minute warning but did not interrupt again. We find no abuse of discretion. United States v. Jones, 534 F.2d 1344, 1346 (9th Cir.), cert. denied, 429 U.S. 840 (1976); United States v. Salazar, 425 F.2d 1284, 1287 (9th Cir. 1970).

AFFIRMED IN PART AND REVERSED IN PART

FOOTNOTES

1/ Knowledge that the property in question has been stolen is one of the essential elements of the crime of receiving stolen property. 18 U.S.C. § 2313 (1970).

2/ The government first attempted to refresh McKay's memory by showing him a transcript of his testimony before the grand jury:

> McKay: I get a recollection in my memory saying that I might have said that. But as I sit here right now I cannot say that I can remember Mr. Patterson or him saying this to me at that time. It's been a long time, you know. This is almost two years ago, and I've got to swear under oath right now, and I can't say that I can actually remember him saying that. If I can say that, I can go off with that and say --

The testimony continued:

> Q. As you sit here today, you can't remember what Mr. Patterson said to you about where he got the forklifts?
>
> A. Right.

Q. But at the time you appeared before the Grand Jury back in March and testified to what he said, at that time apparently you were able to recall; is that correct?

A. Yeah, I was a lot madder at him then.

Q. Well, were you able to recall a little bit better?

A. I must have been.

Q. You say you were mad at them (sic) then. Were you lying before the Grand Jury?

A. No, I don't think so.

The government then offered a portion of the grand jury transcript into evidence. After defense counsel objected, the following exchange occurred:

THE COURT: I think this is admissible. You can't remember this at this time; is that true?

THE WITNESS: Yes.

THE COURT: But is the Grand Jury transcript which you read, is it accurate?

THE WITNESS: I believe so.

THE COURT: I'm going to allow this to be read under Rule 803(5), past recollection recorded.

3/ Rule 803(5) of the Federal Rules of Evidence provides:

> The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
>
> . . . .
>
> (5) Recorded recollection. A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable him to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in his memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.

4/ In Senak the court rejected contemporaneousness as the sole test of whether an event was fresh in a witness' mind at the time the record was made. There, the trial court admitted a witness' statement made three years after the event in question; here, the period is only ten months.

In Senak, however, the court noted the existence of unusual circumstances indicating the witness' fresh memory and reliability of her knowledge at the time she made the statement. The recorded statement displayed no lapses in the witness' memory. The statement was specific and detailed. The witness had read her statement and had edited it before signing it as a true account of her knowledge at that time. The court observed that the witness had been trying to remember not a routine transaction but arrangements with a lawyer who was defending her boyfriend against criminal charges. Finally, the witness testified explicitly at trial that her statement had been true at the time she made it.

5/ In Edwards this court upheld admission of a statement made by a companion of the defendant, describing events leading to the crime, even though the companion admittedly was drunk when he gave the statement to police. The statement was made the day after the events in quesion, was signed by the witness and contained an inscription in his handwriting acknowledging he had read the statement and it was correct to the best of his knowledge. At trial the companion testified he recalled making the statement, and, although he had no memory of the underlying facts, "he believed the statement accurately reflected his recollection at the time it was made." 539 F.2d at 692.

The indications of reliability are stronger, we believe, in the instant case. McKay recalled testifying before the grand jury, he remembered being under oath at that time and, although he admitted exaggerating his testimony to the grand jury, he also said he thought he had told the truth.

6/ Government Proposed Exhibit No. 22, which was not offered into evidence, was a two-page statement handwritten by McKay and given to Detective Glenn Barnes of the Washoe County Sheriff's Office. Barnes and FBI Agent Carl Olsen interviewed McKay jointly about February 12, 1080, at the sheriff's office. McKay testified, after his memory was refreshed by reading his own statement, that he had written in the statement he had asked the defendant where he obtained the forklifts. The essence of McKay's testimony was that the defendant told him he had a a friend who stole them from a loading dock at his place of employment. (RT 157-158) Detective Barnes testified, after refreshing his recollection with his own report, that McKay had told him the defendant told McKay that he had a friend working at a truck line or forklift business who would steal the forklifts and bring them to Patterson. (RT 338) Further, Agent Olson testified, after refreshing his memory with his own report, that McKay had said Patterson had told him they were removing padlocks and side panels from the forklifts because they were stolen. (RT 391)

7/ See note 6 supra.

APPENDIX B

Order denying Petition for Rehearing
July 16, 1982

FILED

July 16, 1982

Phillip B. Winsberry
Clerk, U.S. Court of
Appeals

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	)	No.
	)	81-1211
Plaintiff-Appellee,	)	
	)	ORDER
vs.	)	
	)	
JAMES HENRY PATTERSON,	)	
	)	
Defendant-Appellant.	)	
	)	

Before: KENNEDY and SKOPIL, Circuit Judges, and BURNS,* District Judge.

The opinion of June 2, 1982 is amended by deleting the fifth sentence of foornote 6, slip op. at 2326 n.6, which reads as follows:

> "Detective Barnes testified, after refreshing his recollection with his own

*Honorable James M. Burns, Chief Judge, United States District Judge for the District of Oregon, sitting by designation.

report, that McKay had told him the defendant told McKay that he had a friend working at a truck line or forklift business who would steal the forklifts and bring them to Patterson. (RT 338)"

The petition for rehearing is denied.

APPENDIX C

Verbatim transcript of
Reporter's Transcript on Appeal
Trial, July 22, 24, 25, 28 & 29, 1980

Reno, Nevada

Pages 61-64, 66-76, 160, 1970, 186, 187

IN THE UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

BEFORE THE HONORABLE EDWARD C. REED, JR.

DISTRICT JUDGE

UNITED STATES OF AMERICA,	)
	)
Plaintiff,	)
	)
vs.	)
	)
GERALD HEIDINGER: STEVEN CASTRO AUSTIN; and JAMES HENRY PATTERSON,	)
	)
Defendants.	)

Case No. CR-R-80-22-ECR

Courtroom No. 1

REPORTER'S TRANSCRIPT ON APPEAL
TRIAL

July 22, 24, 25, 28 & 29, 1980

Reno, Nevada

Reported by: Richard L. Molezzo, CSR #40

THE CLERK: Speak to the microphone and state your name.

THE WITNESS: James Edward McKay.

THE COURT: Can you just move it a little closer. Say something now.

THE WITNESS: James Edward McKay.

THE COURT: You're going to have to speak right out to us.

THE CLERK: Please spell your last name.

THE WITNESS: M-c, capital K-a-y.

THE CLERK: What city and state do you reside?

THE WITNESS: Reno, Nevada.

THE CLERK: Thank you.

JAMES EDWARD McKAY,
called as a witness on behalf of the Plaintiff, having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. PRO:

Q: Mr. McKay, what's your occupation at the present time?

A: I work for Petroleum Engineering as a -- a field

foreman, I guess.

Q: Field foreman. And how long have you worked in that particular capacity?

A: About two months.

Q: Do you know a man by the name of James Henry Patterson?

A: Yes, I do.

Q: Do you see Mr. Patterson in the courtroom?

A: Yes, I do.

Q: Would you point to him, please, and describe what he's wearing?

A: Wearing a blue knit shiirt, they call it, or something.

Q: All right. Is he seated next to anyone?

A: To Toby Tobeler, I guess.

MR. PRO: Your Honor, may the record reflect the witness has identified the defendant--

THE COURT: Yes, the record will so indicate.

BY MR. PRO:

Q: Mr. McKay, are you related to Mr. Patterson in any way?

A: Yes, I am.

Q: What is that relationship?

A: He's my uncle.

Q: All right. Have you ever been employed by your uncle, Mr. Pattesron?

A: Yes, I have.

Q: How many previous occasions have you been employed by him?

A: Oh, two or three. Two times, I guess.

Q: All right. And in those instances, what type of work did you do for him?

A: One time I was driving a truck for him hauling topsoil, and then another time I was working in Desert Springs putting in septic tanks and water lines and stuff like that.

Q: All right. With regard to your employment at Desert Springs, could you tell us during what terms you were working out at Desert Springs?

A: From the start of it till it was about three-quearters done.

Q: All right. Let's try and put months or years to that. When did that project start? When did you start

working out there, what month, what year?

A: I think it was about two years ago. It was in the winter, though.

Q: In the winter about two years ago?

A: Yes.

Q: And when did you leave the employment of Desert Springs project, the employment of Mr. Patterson?

A: End of last summer.

Q: Last summer?

A: Yes.

Q: Can you remember a month, June, July, August, September?

A: No, I sure can't.

Q: All right. Last summer, you mean, 1979; is that correct?

A: Yes.

Q: All right. Now, Mr. McKay, you're testifying here today under a particular understanding with the Government; are you not?

A: Yes.

Q: And could you tell the Court and ladies and gentlemen of the jury what your understanding of the conditions of your testimony are?

A: I just talk to my lawyer and he said that I should have immunity from anything that could come up in this trial.

Q: All right. And in fact, before the Federal Grand Jury you were advised that you would not be prosecuted by the Federal Government for any testimony that you gave; is that correct?

A: Yes.

Q: Were you also advised that your testimony was being given under penalty of perjury?

A: Yes

Q: You understand here today that you've taken an oath to tell the truth and that the promise of immunity does not protect you from the prosecution for perjury if you testify falsely? You understand that; do you not?

. . . . . .

A: I'm not very good on months and days and stuff. They're just kind of all run together. But it was after--after I had been there probably six months or something. Two of them showed up.

Q: Two of them showed up on the

same day?

A: Yes.

Q: All right. Could you recall, as you testify here today, the date on which that particular forklift showed up at the Desert Springs--I'm sorry, yes, Desert Springs site?

A: Can I what?

Q: Can you recall the approximate date, what month of the year it was when the-- when the forklift, the two forklifts you mentioned appeared, first appeared at the Desert Springs jobsite?

A: No, I sure couldn't.

MR. PRO: The Court's indulgence, your Honor?

THE COURT: Yes.

BY MR. PRO:

Q: All right Mr. McKay, with regard to those two forklifts, did you

operate them that first day that you were on the site?

A: No.

Q: All right. At the end of that workday, did you do anything with regard to those particular forklifts?

A: Yeah, I think it was that night or the next night or

something, after work we went out and tried to get them fired up. And one of them didn't have a key. And the other one had a key in it and got fired up, and then had some locks on the gas tanks and stuff. And so didn't have the keys to any of that, so we cut the gas-- all the locks off of them.

Q: Okay. You say "we" did this. Who was the "we" that were involved? Who else was involved in this with you?

A: Me and Jim.

Q: All right. Did you do this on your own initiative or did Mr. Patterson ask you to help him?

A: I think I probably just went out with him.

Q Did he ask you to go out with him?

A: That, I really couldn't say. It's been two years. I imagine.

Q: Have you ever told anybody connected with the law enforcement that he did ask you to go out with him to the forklifts?

A: I don't know. Did I?

Q: Well, I'm--

THE COURT: Would you just answer the--

MR. PRO: I'm asking--

THE COURT: Just a minute.

You try to answer the question rather than to ask him. You just answer questions. Do you understand that, sir?

THE WITNESS; Okay.

THE COURT: All right?

THE WITNESS: Yeah, I guess I did.

BY MR. PRO:

Q: Do you recall telling Special Agent Carl Olsen, who is here in court, that on or about the 14th of February of this year that Mr. Patterson asked you to come out and help him do some work on those forklifts?

A: Okay. Yes.

Q: Do you recall telling him that?

A: Yes.

Q: Would you have been telling

Mr. Olsen the truth at that time?

A: Yes.

Q: Okay. I realize that was some months back. Would the events have been fresher in February than they are now, in July, perhaps.

A: I'm sure they would be.

Q: All right. What, specifically, did Mr. Patterson ask you to help him do with regard to these forklifts? Why don't you tell the ladies and gentlemen of the jury everything that you did to both forklifts.

A: Well, we cut the padlocks off of the gas spouts, or wehre you put the gas in the . And--

Q: Was that on both forklifts, by the way, were there padlocks on both of them?

A: I'm really not sure.

Q: Who cut them?

A: I think I held them up and Jim cut them.

Q: All right. What did he use to cut them with?

A: A set of bolt cutters.

Q: All right, fine. What else, other than cutting the padlock off the gas tank? Were there other padlocks on either or both of the forklifts?

A: Yeah, and there is some on, I believe it was the side panel on the green one. We cut them off. And took the side panels off, and that's about all.

Q: All right.

MR. PRO: Your Honor, I don't recall the exhibit numbers--

THE COURT: Come forward and

you can look at them.

MR. PRO: If I can look at the photographs we have.

BY MR. PRO:

Q: You mentioned there was a green forklift. What color was the other one?

A: Yellow.

Q: Yellow?

A: Yes.

MR. PRO: I'd like to show you what's been marked--what's been introduced into evidence, Government's Exhibits 10, 11, and 12 and 13 and proposed Exhibits 16, 17, and 18.

First looking at 10, 11, 12 and 13, Would you look at those particular photographs, please, in evidence, and tell me if you can identify what's depicted in those four photographs.

A: This is a forklift.

Q: Do those--

A: With some numbers.

Q: I'm sorry. Do those appear to be photographs of the yellow forklift that you and Mr. Patterson were working on that evening?

A: I don't think so. I don't know. This one here is--it's got a bunch of grinding stuff on it. It didn't have that when I was working out there, when it came in.

Q: All right. How about the other photographs, that depict the green forklift?

A: Yes, that looks like one of them.

Q: All right. Let me show you Government's Exhibits 5, 6, and 7, which is another yellow forklift. I ask you to look at those. Can you identify what's

depicted in those photographs?

A: Yeah, that looks like the yellow one.

Q: Can you tell which-- There are two sets of photographs of two different yellow forklifts. Can you tell which of those, if either of them is yellow-- pictures of the yellow forklift that you and Mr. Patterson were working on that night?

A: I'm really not sure. Like I say-- not sure-- I think it was the smaller one, this one here. It mzight have been this one. But I don't remember-- It wasn't, didn't have the paint knocked around off of it and stuff.

Q: So there was another one out there that's not depicted there. Is that your testimony?

A: Well, I believe this was the one that was there originally when the job first started.

Q: Okay. Now, let's talk about that one. When you say "this one." What's the exhibit number on that photograph?

A: Exhibit No. 5.

Q: Exhibit No. 5, you think, is the-- a photograph of the forklift that was at the Desert Springs jobsite when you arrived and started working there?

A: Yes.

Q: All right. Why don't you put those aside then. And just look at the yellow forklift that's depicted in the other photographs.

THE COURT: The numbers of these, do you know what they are? You

You may approach the witness.

MR. PRO: Thank you, your Honor.

THE COURT: Just to make the record--

BY MR. PRO:

Q: I'm removing from the witness Exhibits 5, 6, and 7, which are the same forklift which Mr. McKay's just testified to as being the forklift there when he started employment.

And I'll also remove the green photographs.

THE COURT: That will leave us with what numbers?

MR. PRO: That leaves us with 10, 11, 12 and 13.

BY MR. PRO:

Q: Specifically looking at the Exhibits 12 and 10. I realize the other two Exhibits 11 and 13, show very small

portions, perhaps not identifiable portions, to you. Looking at 12 and 10, it depicts a yellow forklift. Can you look at that and tell me if that appears to be the yellow forklift that you and Mr. Patterson were working on the same evening you were working on the green one?

A: Yeah, I believe it is.

Q: There's something different about it now, you say something ground off?

A: Well, yeah, it looks like somebody was going to repaint part of it or something.

Q: Oh, some paint scraped off, perhaps?

A: Yeah, paint scraped off.

Q: All right, fine.

Now, what did you do with the

padlocks that were cut off of the forklift?

A: They were thrown in a septic-tank hole right there where we were taking them off. Right where they were parked.

Q: Okay. What about the side panels? You indicated there were some side panels removed. What was the reason for removing those?

A: They had some names on them.

Q: They did. Do yozu remember the names?

A: No, sir, I sure don't.

Q: Why did you want to take off side panels with names on them?

A: I guess because maybe whoever owned them would be able

to see who they were. I don't know.

Q: Did you do anything to the side panels that were removed from the two forklifts?

A: Just put them over there alongside the shed by the house.

Q: By whose house?

A: By Jim's house.

Q: Jim Patterson's house?

A: Yes.

Q: At Desert Springs?

A: Um-hum.

Q: Okay. When did you last see those side panels there? The side panels next to the house.

A: Probably every time I went back to gas something up.

Q: Okay. Did there ever come a time when those panels were no longer there, to your knowledge?

A: Not to my knowledge.

Q: As far as you know, they were still there when you left the employment of Mr. Patterson?

A: Yes.

Q: Now, did Mr. Patterson tell you where he obtained these two forrklifts?

A: I'm not sure. I don't even recall of him.

Q: You don't recall him telling you where or how he obtained these two forklifts?

A: No, I can't, you know, say that I can actually sit

here and remember him telling me when we were working on them or something where that they came from.

Q: All right. Do you recall testifying before the Federal Grand

Jury here in Reno on March 10, 1980?

A: Yes.

MR. PRO: For counsels' reference, I'm going to show the witness Page 8, commencing at line-- commencing at line 23 through Page 9, line 11.

BY MR. PRO:

Q: Would you please read to yourself the question commencing at line 23. Don't read it out loud. And go on through to the next page. At line 11.

Have you had a chance to read those?

A: Yes.

Q: Okay. Thank you.

First of all, when you appeared before the Federal Grand Jury on March 10th, Mr. McKay, you were

under oath and sworn to tell the truth; were you not?

A: Yes.

Q: And you did so to the best of your ability on that date; did you not?

A: Yes.

Q: Does reading that passage from your testimony before the Grand Jury refresh your recollection as to whether or not Mr. Patterson told you anything about where he obtained the two forklifts?

A: I get a recollection in my memory saying that I must have said that. But as I sit here right now I cannot say that I can remember Mr. Patterson or Jim saying this to me at that time. It's been a long time, you know. This

is almost two years ago, and I've got to swear under oath right now, and I can't say that I can actually remember him saying that. If I can say that I can go off with that and say--

THE COURT: Well, ask another question, please.

MR. PRO: Thank you, your Honor.

BY MR. PRO:

Q: It's your testimony that while you cannot remember today what Mr. Patterson said to you the night that you were cutting the locks off this forklift, if I understand you correctly, that's what you're saying, is that correct, at this time, you can't remember that? As you sit here today, you can't remember what Mr. Patterson said to you about where he got the

forklifts?

A: Right.

Q: But at the time you appeared before the Grand Jury back in March and testified to what he said, at that time apparently you were able to recall; is that correct?

A: Yeah, I was a lot madder at him then.

Q: Well, were you able to recall a little bit better?

A: I must have been.

Q: You say you were mad at them then. Were you lying before the Grand Jury?

A: No, I don't think so.

Q: All right. Mr.--

MR. PKO: Your Honor, in view of Mr. McKay's inability to recall,

I'd ask to read into the record the passage that I was having him read to refresh his recollection, so the jury can hear what the testimony was on that same subject.

THE COURT: Defense counsel?

MR. PRO: I'd ask the witness, I'm sorry, to read it.

MR. VERTNER: I have no objection.

THE COURT: Mr. Delizonna?

MR. DELIZZONA: No objection, your Honor.

THE COURT: Mr. Tobeler?

MR. TOBELER: Your Honor, I think that I would object to counsel reading into the record something that was testified to before the Grand Jury, based upon the fact that the witness is here, he can testify. I think the

best evidence at this particular time is his testimony and not the pre-offered testimony. The witness is not on trial, your Honor.

MR PRO: Your Honor, that is a prior recorded statement--

THE COURT: I think this is admissible.

You can't remember this at this time; is that true?

THE WITNESS: Yes.

THE COURT: But is the Grand Jury transcript which

you read, is it accurate?

THE WITNESS: I believe so.

THE COURT: I'm going to allow this to be read under Rule 8035, past recollection recorded.

MR PRO: Thank you, your Honor.

Your Honor, would the Court object if I read it?

THE COURT: Go ahead and read it.

MR PRO: Thank you. The question is:

"In other words-- I'm sorry. What?

"ANSWER: He said that he had gotten them out of California from a guy that he knew down there and that they were hot.

"QUESTION: Hot? He used the term 'hot'?" in quotes.

"ANSWER: Yes.

"QUESTION: What does that mean to you?

"ANSWER: Not yours, I guess.

"QUESTION: Hot is not an uncommon term. I mean, you have heard that before?

"ANSWER: Yes.

"QUESTIONS: What does that mean? Does that mean stolen, in your understanding?

"ANSWER: Yes."

MR. PRO: That is the passage I was referring to, your Honor.

. . . . . .

[BY MR. TOBELER:] 169

A: I believe so, but like I say, this is different on them. They were all painted when I saw them. I'm not sure about it.

Q: Now when you saw it, it was all yellow, no paint had been removed?

A: Right.

Q: Whose forklift was this?

A: I believe they were both Jim's.

Q: Okay. Now does this appear to be the green one? I'm showing you Exhibit No. 16, 17 and 18. Does that appear to be the green one?

A: Yes, sir.

Q: And this is the-- appears to be the ones that you took the side panels off?

A: Yes. I'm not sure which one it was we took the side panels off.

Q: At any time, Mr. McKay, did Mr. Patterson ask you to remove any serial numbers?

A: No, sir.

Q: At any time did he as you to alter any serial numbers?

A: No, sir.

Q: Now, you testified earlier, you made the statement last week when asked by Mr. Pro a certain question. You testified that, "I was madder at him then."

Now, what did you mean by that, Mr. McKay? That

was at the time you were testifying before the Grand Jury when you made the statement to them. What did you mean by that?

A: I was told by some people that he was saying a lot of stuff about me after he laid me off or fired me, so I was kind of a little bit hot at him.

Q: And before the Grand Jury, did you exaggerate any of your testimony?

A: Well, maybe a little bit.

Q: I believe your testimony was--correct me if I'm wrong--that those two forklifts that you saw, one of them had keys?

A: Yes, sir.

Q: And the other one did not?

A: Yes, sir.

Q: Do you remember which one had the keys?

A: I'm not sure.

Q: Now, you've already testified that Mr. Patterson did not tell you that these forklifts were stolen. Did he tell you that he got a good deal on them?

A: Yes, sir, I think he did.

Q: You did remember him making that statement?

A: Yes, sir.

Q: You have no idea how much he paid for them?

A: No, sir.

Q: And you have no idea what the value of a forklift was?

. . . . . .

[BY MR. PRO:]

[p. 185, Q: Mr. Tobeler, Mr. McKay, asked you if when you testified before the Grand Jury you exaggerated. And you indicated you]

exaggerated; is that correct?

A: Yes, sir.

Q: Is it your testimony, Mr. McKay, that you tstified falsely before the Grand Jury, you did not tell the truth?

A: Well, I-- Just some of those might have been just stretched a little bit.

Q: Some of those what?

A: Stretched a little bit.

Q: What was stretched a little bit?

A: Well, I just, you know, some of the stuff that when you ask me now and I think back, I can't sit here an think back, from what I can see somebody saying it, you know, actually saying it to me. So I really can't say that is for sure, and I hate to-- I know saying that it for sure what it is, when I testified in Grand Jury. But I hate to swear and testify to it now when I'm not exactly sure that that's what was said. I mean, it's been two years in time, and--

Q: Okay. All right.

Let me see if I can understand that then. Are you saying that today when you testify when questions are put to you and you're asked to recall back events a year or more past, and as you sit here, you cannot recall specific conversations and you don't want to testify that you do recall specific conversations; is that correct?

A: Yes, sir.

Q: All right. I understand that. Are you saying, then,

that when you testified before the Grand Jury, you were able to recall those previous conversations and today you are not?

A: No, sir.

Q: All right. When you testified

before the Grand Jury, is it your testimony now that when you appeared before the Grand Jury, you testified to things that you in fact could not remember?

A: That I wasn't sure of,

Q: What about when you made your statements to Agent Olsen and to the police officers when you talked to them?

A: Mostly that could have been--

Q: I'm sorry, most of that could have been what?

A: Pretty good.

Q: That was a little bit closer to the time that the conversations had taken place; is that correct?

A: Um-hum.

Q: Similarly, when you made your handwritten statement, the Government's proposed Exhibit 22, those were made

closer to the events in question; isn't that correct?

A: Yes, sir.

Q: And were those statements correct that you made in your statement?

A: I believe so, yeah.

MR. PRO: Your Honor, I think at this time I'd offer Government's proposed Exhibit 22 into evidence if there's no objection.

MR. TOBELER: Your Honor, I will have to object to

. . . . . .